ARAB-MALAYSIAN MERCHANT BANK BHD

v.

FORESWOOD INDUSTRIES SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN JC
[SUIT NO: 22-35-2002-II]
24 JULY 2003

CIVIL PROCEDURE: *Amendment - Statement of claim - Appeal against dismissal of application to amend - Amendment sought to include "jointly and severally" in claim against guarantors of loan - Whether guarantors would be prejudiced - Whether guarantors had guaranteed payment of loan jointly and severally - Whether there was no element of surprise - Rules of the High Court 1980, O. 20 r. 5*

This was the plaintiff's appeal against the deputy registrar's decision dismissing its application to amend its statement of claim pursuant to O. 20 r. 5 of the Rules of the High Court 1980 ('RHC'). The amendment sought to insert the words "jointly and severally" in the prayer contained therein that was inadvertently omitted. The plaintiff's claim was against the 2nd, 3rd, 4th and 5th defendants ('the defendants') as guarantors for a loan advanced to the 1st defendant. The said defendants had guaranteed payment of the loan jointly and severally in a Letter of Guarantee and Indemnity. The plaintiff had already obtained a judgment in default of appearance against the 1st defendant.

Held:

[1] In considering an application for amendment under O. 20 r. 5(1) RHC the court will have to bear in mind whether the amendments sought will cause injustice to the other side *(Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd)*. The application for amendment in the present case was *bona fide* because there was no element of surprise since the plaintiff had pleaded the fact of "joint and several liability" of the defendants' guarantee based on cl. 28 of the Letter of Guarantee and Indemnity. (p 14 a-e)

[2] The nature of the defendants' liability was crystal clear and unambiguous as could be seen from the language of the Letter of Guarantee and Indemnity. Hence, the amendment did not affect the essential nature of the suit that remained the same. In fact the amendment to insert the words "jointly and severally" in the relevant prayer would render it consistent with para 6 of the statement of claim. (p 16 b-c)

[3] The parties had explicitly contracted on a joint and several basis. Each guarantor was under a joint and several contract and liable to the full extent of his agreed liability under the guarantee. The creditor was entitled to sue each guarantor separately until the entire debt had been fully paid. (p 16 f)

[4] Notwithstanding that judgment in default had been entered against the 1st defendant, the plaintiff might proceed with the action against the remaining defendants. The principle of election referred to in *Hagemeyer Trading Co (M'sia) Sdn Bhd v. Gibson Trading Co* did not arise as that principle applied only to a case of joint liability in the relationship of principal and agent and this was not so in the present case. (p 17 b-c)

[5] The amendment dates back to the time when the original un-amended statement of claim was issued and served on the defendants. There would be no prejudice or injustice suffered by any of the defendants if the amendment was granted. (p 17 f-g)

[Appeal allowed.]

Case(s) referred to:

Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 CA ***(refd)***

Asia Commercial Finance (M) Bhd v. Island Rentals Sdn Bhd & Ors [2002] 2 CLJ 741 HC ***(refd)***

Associated Leisure Ltd & Ors v. Associated Newspaper Ltd [1970] 2 All ER ***(refd)***

Clarapede & Co v. Commercial Union Association [1883] 32 WR 262 ***(refd)***

Copper v. Smith [1884] 26 Ch D 700 ***(refd)***

Datuk David Teng Lung Chi v. Chiew Chin Sing [1998] 5 MLJ 585 HC ***(refd)***

Hagemeyer Trading Co (M'sia) Sdn Bhd v. Gibson Trading Co [1978] 2 MLJ 101 ***(refd)***

Murugappa Chetty v. Seenivasagam & Ors [1936] MLJ (Rep) 173 ***(refd)***

Palaniappan v. Universiti Pertanian Malaysia [1995] 1 CLJ 693 HC ***(refd)***

Parr v. Snell & Ors [1923] 1 KBD 1 ***(refd)***

Paterson, Simons & Co (Msia) Sdn Bhd v. Pembangunan Leasing Corporation Sdn Bhd & Ors [1989] 2 CLJ 209; [1989] 2 CLJ (Rep) 221 HC ***(refd)***

Sio Kon Lin & Anor v. SB Mehra [1981] 1 MLJ 225 ***(refd)***

Sneade v. Wortherton etc Co [1904] 1 KB 295 ***(refd)***

United Malayan Banking Corporation Bhd v. Datin Theresah Abdullah [1995] 1 AMR 304 HC ***(refd)***

Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 13 r. 1, O. 20 r. 5(1)

Other source(s) referred to:

Dr John Philips & Dr John O'Donovan, *Modern Contract of Guarantee*, 2nd edn, 1992, p 449

JUDGMENT

Lau Bee Lan JC:

At the outset, it is to be stated that the parties have consented that the appeals in Civil Suit No. 22-35-2002-11 and Civil Suit No. 22-38-2002-11 be heard together as the issues and the parties are similar. The plaintiff is represented by Miss Stella Chin together with Mr. Yong Sie Mee whilst Mr. James Lo acts for the 2nd, 3rd and 5th defendants. The court was informed that the 4th defendant would not be resisting the claim as he had been adjudged a bankrupt and the plaintiff had obtained leave from the bankruptcy court, Sibu, on 16 June 2003 and are in the process of extracting the order therein. It is recorded that the counsel for the plaintiff expressed that it is their client's wish that both the Suits No. 35 and 38 be heard by me notwithstanding that there is one pending action in High Court 1 (Civil Suit No. 22-37-2002-1 which was part-heard and to be continued on 31 July 2003) wherein the learned judge in High Court 1 would not mind if this court proceed with the hearing on 24 June 2003 and that the decision of this court shall bind all parties if they agree. However, counsel for the 2nd, 3rd and 5th defendants stated that their clients have not agreed to the proposal that this court's decision would bind all parties. Further, the court allowed the plaintiff's application to address the court in one suit ie, Suit No. 35 as the parties and issues are identical.

The plaintiff has appealed against the decision of the learned deputy registrar dismissing their application to amend the statement of claim pursuant to O. 20 r. 5 Rules of the High Court 1980 ("the RHC") on the following grounds:

(a) to enable the real question in controversy between the parties to be decided; and

(b) to correct a *bona fide* oversight as to the precise and proper wording sought.

The essence of the amendment sought was to insert the words "jointly and severally" in the prayer contained in the statement of claim.

I have considered the submissions of both learned counsel for the plaintiff and the 2nd, 3rd and 5th defendants. I shall now address the issues raised.

It is not disputed that it is trite law that in considering an application for amendment under O. 20 r. 5(1) of the RHC, the court will have to bear in mind whether the amendments sought will cause injustice to the other side. As to the determination of whether injustice would result or otherwise, the landmark decision of *Yamaha Motor Co. Ltd v. Yamaha Malaysia Sdn. Bhd.* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 cited by Miss Stella Chin is in point. The Federal Court, held, *inter alia*, that the three (3) basic questions are:

(a) Whether the application was *bona fide*?

(b) Whether the prejudice (if any) caused to the other side can be compensated by costs?; and

(c) Whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character?

As to whether the application is *bona fide*, I agree with Miss Stella Chin's submission that there is no element of surprise as it is clear from the statement of claim that the plaintiff has pleaded the fact of "joint and several liability" of the 2nd, 3rd, 4th and 5th defendants' guarantee based on cl. 28 of the Letter of Guarantee and Indemnity (see para 6 of the statement of claim). As can be seen from the averment of Mr, Yong Sie Mee, in para 3 of his affidavit affirmed on 21 January 2003, the words "jointly and severally" have been inadvertently omitted. It is to be noted that the proposed amendment is based upon and arise from the same facts as the original cause of action. The court is also mindful that under O. 20 r. 5 of the RHC, the court may "at any stage of the proceedings" allow amendments.

Mr. James Lo did not, I observe, submit on this point, Hence, following the authorities cited by Miss Stella Chin namely, *Abdul Johari b. Abdul Rahman v. Lim How Chong & 6 Ors* [1997] 1 CLJ 361, *Datuk David Teng Lung Chi v. Chievv Chin Sing* [1998] 5 MLJ 585 and the cases of *Copper v. Smith* [1884] 26 Ch D 700, *Associated Leisure Ltd & Ors v. Associated Newspaper Ltd.* [1970] 2 All ER and *Clarapede & Co. v. Commercial Union Association* [1883] 32 WR 262 cited in the case of *Datuk David Teng Lung Chi (supra)*, I am of the view that the aoplication for amendment is *bona fide* and is sought for the purpose of dealing with the matters in controversy.

To my mind, the bone of contention of Mr. James Lo is that the amendment sought would in effect turn the suit from one character into a suit of another and inconsistent character. His line of argument on this point is premised on the case of *Asia Commercial Finance (M) Bhd v. Island Rentals Sdn. Bhd. & Ors* [2002] 2 CLJ 741. The learned counsel's contention is that since judgment in default has been entered against the 1st defendant, following the principle in *Asia Commercial Finance (M) Bhd (supra)* ("ACF"), the amendment sought would change the claim against all the other defendants from a joint basis to a joint and several basis and therefore there is a change in the character of the suit.

With deference to the learned judge, RK Nathan J, I do not agree with the decision therein. His Lordship had relied on the case of *Parr v. Snell & Ors* [1923] 1 KBD 1 which is a case where the plaintiff entered into an agreement with the defendants with respect to the resale of shares upon the plaintiff relinquishing a post in the defendants' company. In my view both Lord Sterndale MR and Scrutton LJ held that it was important to look into the language of the agreement to determine whether it was a joint contract or a joint and several contract as upon the determination of that question, lies the application of the technical rule of law " that where there are joint contractors if judgment is signed against one the other is discharged." (per Scrutton LJ at p. 9) or "(where) in a joint contract, there has been a final judgment signed against two of the three joint contractors; and it is not competent for the plaintiff, having obtained final judgment against two of the joint contractors, to proceed against the other."(per Lord Sterndale MR at p. 4). Thus at pp. 4-5 Lord Sterndale said, "I cannot agree with the learned judge that this was a joint and several contract. *I think it is a joint one; it is only necessary to read it in order to see that.* It is not a matter that admits of much discussion; *it entirely depends upon the conclusions to be drawn from the language of the agreement ...*". Scrutton LJ held the view that it is a joint contract when His Lordship said, "The two Snells and Quertier agree that if the secretary relinquishes his position *his shares be purchased from him by a person either appointed by them, or by persons delegated by them. That seems to me to be a contract to find a purchaser approved by the three, and to be clearly a joint and not a several contract.* That being so, in this case judgment has been signed against two and the third is discharged under the technical rule in *Kendall v. Hamilton,* unless there is some rule or statute which prevents the operation of the old rule." (emphasis added).

Transposed to the facts before us, it is apparent that in the pleadings, para 6 of the statement of claim, the plaintiff has not only pleaded the fact of "joint and several" liability of the 2nd, 3rd, 4th and 5th defendants' guarantee, but that fact is based on cl. 28 of the Letter of Guarantee and Indemnity dated 27 December 1995 (exh. "YSM1" annexed to the affidavit of Mr. Yong Sie Mee) which so provides to that effect. The nature of the defendants' liability is crystal clear and is unambiguous as can be seen from the language of the Letter of Guarantee and Indemnity which reads, "*Our liability hereunder shall be joint and several and every agreement and undertaking on our part shall be construed accordingly and all references to us herein contained shall where the context requires or admits be construed as references to all or any of us.*" (emphasis added). Hence, I agree with Miss Stella Chin's submission that the amendment does not affect the essential nature of the suit at all which remains the same but in fact the amendment to insert the words "jointly and severally" in the prayer would render it consistent with para 6 of the statement of claim.

The other argument of Mr. James Lo is that the principal agreement (ie, "the facility agreement") is really part and parcel of the same contractual arrangement between all the five defendants together with the guarantee agreement. I do not see any merit in this contention as one would still have to peruse through the relevant agreements, to see the nature of the liability of the creditor *vis-a-vis* the borrower and the guarantors.

In this regard, I agree with Miss Stella Chin's submission that as the parties have explicitly contracted on a joint and several basis, the corollary to that is that each guarantor under a joint and several contract is liable to the full extent of his agreed liability under the guarantee. The creditor is entitled to sue each guarantor separately until the entire debt has been fully paid. (see *United Malayan Banking Corporation Bhd v. Datin Theresah bt. Abdullah* [1995] 1 AMR 304 and *Paterson, Simons & Co. (Msia) Sdn. Bhd v. Pembangunan Leasing Corporation Sdn. Bhd & 2 Ors.* [1989] 2 CLJ 209; [1989] 2 CLJ (Rep) 221).

Further, as has been pointed out by Mr. Yong, citing from the *Modern Contract of Guarantee* by Dr. John Philips and Dr. John O' Donovan, 2nd edn. (1992) at p. 449 "When a creditor obtains judgment against the principal debtor, .his cause of action against the guarantor does not merge in the judgment. As long as the principal debt is unsatisfied, the cause of action on the debt remains and the creditor retains his right to enforce his collateral security.

In addition O. 13 r. 1 of the RHC envisages such claims, O. 13 r. 1 states *"(1) Where a writ is indorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any"*. (emphasis added). In the instant case, which is a claim for a liquidated demand, notwithstanding that judgment in default against the 1st defendant has been entered, the plaintiff may proceed with the action against the remaining defendants.

To my mind, the principle of election referred to in *Hagemeyer Trading Co. (M'sia) Sdn. Bhd v. Gibson Trading Co.* [1978] 2 MLJ 101 does not arise as the principle of election applies only to a case of joint liability in the relationship of principal and agent and this is not so in the case before us.

Mr James Lo also submitted that even without the *ACF* case, the judgment against the 1st defendant being on a joint basis, would be totally inconsistent with a judgment against the other defendants which would be on a joint and several basis if the amendment is allowed. With due respect to learned counsel, I do not agree, as without relying on the "joint basis" principle alluded to in the *ACF* case, how can this alternative argument of learned counsel subsist? Hence, I am of the view that this argument is without merit.

The final contention of Mr James Lo is that taking the judgment in default entered against the 1st defendant as a point of no return, the principle that the amendment dates back to the institution of the writ would only have meaning if judgment had not been entered against the 1st defendant.

On this point, I agree with Miss Stella Chin that based on the principles enunciated in *Sio Kon Lin & Anor v. S.B. Mehra* [1981] 1 MLJ 225, *Murugappa Chetty v. Seenivasagam & Ors.* [1936] MLJ Rep. 173 and *Sneade v. Wortherton etc Co.* [1904] 1 KB 295 followed by the former case, the amendment dates back to the time when the original un-amended statement of claim was issued and served on the defendants. I also concede with the learned counsel that there is no prejudice or injustice suffered by any of the defendants at all if amendment is granted.

As to the third question of whether the prejudice (if any) caused to the other side can be compensated by costs, I agree with Miss Stella Chin's submission that there is none, as there is no element of surprise and the merits of the case is yet to be adjudicated upon. (see *Palaniappan v. Universiti Pertanian Malaysia* [1995] 1 CLJ 693.

For all the reasons above, the appeal is allowed with costs.